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**5—Administrative Personnel**

590h(b)) is considered to be with an agency.

**Subpart H—Back Pay**

5 U.S.C. 5596(c).

46 FR 58275, Dec. 1, 1981, unless noted.

**Applicability.**

This subpart contains regulations of the Office of Personnel Management to carry out section 5596 of title 5, United States Code, which authorizes payment of back pay and reasonable attorney fees for the purpose of reimbursing an employee financially (to the extent possible) when, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance), the employee is found by an appropriate authority to have been affected by an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee. This subpart should be read together with this part of law.

This subpart does not apply to classification action.

**2 Coverage.**

Except as provided in paragraph 3 of this section, this subpart applies to employees, as defined in § 550.803 of this part.

This subpart does not apply to—  
Employees of the government of the District of Columbia; and  
Employees of the Tennessee Valley Authority.

**3 Definitions.**

This subpart:  
“Agency” has the meaning given in section 5596(a) of title 5, United States Code.

“Appropriate authority” means an authority having authority in the case to correct or direct the correction of an unjustified or unwarranted personnel action, including (a) a court, (b) the Comptroller General of the United States, (c) the Office of Personnel Management, (d) the Merit

**Chapter I—Office of Personnel Management FECS.****5 CFR § 550.805**

Systems Protection Board, (e) the Equal Employment Opportunity Commission, (f) the Federal Labor Relations Authority and its General Counsel, (g) the Foreign Service Labor Relations Board, (h) the Foreign Service Grievance Board, (i) an arbitrator in a binding arbitration case, and (j) the head of the employing agency or another official of the employing agency to whom such authority is delegated.

“Collective bargaining agreement” has the meaning given that term in section 7103(a)(8) of title 5, United States Code, and (with respect to members of the Foreign Service) in section 1002 of the Foreign Service Act of 1980 (22 U.S.C. 4102(4)).

“Employee” means an employee or former employee of an agency.

“Grievance” has the meaning given that term in section 7103(a)(9) of title 5, United States Code, and (with respect to members of the Foreign Service) in section 1101 of the Foreign Service Act of 1980 (22 U.S.C. 4131). Such a grievance includes a grievance processed under an agency administrative grievance system established under Part 771 of this chapter.

“Pay, allowances, and differentials” means monetary and employment benefits to which an employee is entitled by statute or regulation by virtue of the performance of a Federal function.

“Unfair labor practice” means an unfair labor practice described in section 7116 of title 5, United States Code, and (with respect to members of the Foreign Service) in section 1015 of the Foreign Service Act of 1980 (22 U.S.C. 4115).

“Unjustified or unwarranted personnel action” means an act of commission or an act of omission (i.e., failure to take an action or confer a benefit) that an appropriate authority subsequently determines, on the basis of substantive or procedural defects, to have been unjustified or unwarranted under applicable law, Executive order, rule, regulation, or mandatory personnel policy established by an agency or through a collective bargaining agreement. Such actions include personnel actions and pay actions (alone or in combination).

**§ 550.804 Determining entitlement to back pay.**

(a) When an appropriate authority has determined that an employee was affected by an unjustified or unwarranted personnel action, the employee shall be entitled to back pay under section 5596 of title 5, United States Code, and this subpart only if the appropriate authority finds that the unjustified or unwarranted personnel action resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee.

(b) The requirement for a “timely appeal” is met when—

(1) An employee or an employee's personal representative initiates an appeal or grievance under an appeal or grievance system, including appeal or grievance procedures included in a collective bargaining agreement; a claim against the Government of the United States; a discrimination complaint; or an unfair labor practice charge; and

(2) An appropriate authority accepts that appeal, grievance, claim, complaint, or charge as timely filed.

(c) The requirement for an “administrative determination” is met when an appropriate authority determines, in writing, that an employee has been affected by an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee.

(d) The requirement for “correction of the personnel action” is met when an appropriate authority, consistent with law, Executive order, rule, regulation, or mandatory personnel policy established by an agency or through a collective bargaining agreement, after a review, corrects or directs the correction of an unjustified or unwarranted personnel action that resulted in the withdrawal, reduction, or denial of all or part of the pay, allowances, and differentials otherwise due the employee.

**§ 550.805 Back pay computations.**

(a) When an appropriate authority corrects or directs the correction of an unjustified or unwarranted personnel action that resulted in the withdrawal,

(viii) such other employee as may be excluded by regulations of the President or such other officer or agency as he may designate.

(b) Under regulations prescribed by the President or such officer or agency as he may designate, an employee who—

(1) has been employed currently for a continuous period of at least 12 months; and

(2) is involuntarily separated from the service, not by removal for cause on charges of misconduct, delinquency, or inefficiency; is entitled to be paid severance pay in regular pay periods by the agency from which separated.

(c) Severance pay consists of—

(1) a basic severance allowance computed on the basis of 1 week's basic pay at the rate received immediately before separation for each year of civilian service up to and including 10 years for which severance pay has not been received under this or any other authority and 2 weeks' basic pay at that rate for each year of civilian service beyond 10 years for which severance pay has not been received under this or any other authority; and

(2) an age adjustment allowance computed on the basis of 10 percent of the total basic severance allowance for each year by which the age of the recipient exceeds 40 years at the time of separation.

Total severance pay under this section may not exceed 1 year's pay at the rate received immediately before separation. For the purpose of this subsection, basic pay includes premium pay under section 5545(c)(1) of this title.

(d) If an employee is reemployed by the Government of the United States or the government of the District of Columbia before the end of the period covered by payments of severance pay, the payments shall be discontinued beginning with the date of reemployment and the service represented by the unexpired portion of the period shall be recredited to the employee for use in any later computations of severance pay. For the purpose of subsection (b)(1) of this section, reemployment that causes severance pay to be discontinued is deemed employment continuous with that serving as the basis for severance pay.

(e) If the employee dies before the end of the period covered by payments of severance pay, the payments of severance pay with respect to the employee shall be continued as if the employee were living and shall be paid on a pay period basis to the survivor of the employee in accordance with section 5582(b) of this title.

(f) Severance pay under this section is not a basis for payment, and may not be included in the basis for computation, of any other type of United States or District of Columbia Government benefits. A period covered by severance pay is not a period of United States or District of Columbia Government service or employment.

(g) The Secretary of Agriculture shall prescribe regulations to effect the application and operation of this section to an individual named by subsection (a)(2)(B) of this section. (Added Pub. L. 90-83, § 1(34)(C), Sept. 11, 1967, 81 Stat. 201; amended, Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1173; Pub. L. 96-70, Sept. 27, 1979, 93 Stat. 470.)

**5 USC § 5596. Back pay due to unjustified personnel action**

(a) For the purpose of this section, "agency" means—

(1) an Executive agency;

- (2) the Administrative Office of the United States Courts;
- (3) the Library of Congress;
- (4) the Government Printing Office, and
- (5) the government of the District of Columbia.

(b) (1) An employee of an agency who, on the basis of a timely appeal or an administrative determination (including a decision relating to an unfair labor practice or a grievance) is found by appropriate authority under applicable law, rule, regulation, or collective bargaining agreement, to have been affected by an unjustified or unwarranted personnel action which has resulted in the withdrawal or reduction of all or part of the pay, allowances, or differentials of the employee—

(A) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect—

(i) an amount equal to all or any part of the pay, allowances, or differentials, as applicable which the employee normally would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period; and

(ii) reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title, shall be awarded in accordance with standards established under section 7701 (g) of this title; and

(B) for all purposes, is deemed to have performed service for the agency during that period, except that—

(i) annual leave restored under this paragraph which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management, and

(ii) annual leave credited under clause (i) of this subparagraph but unused and still available to the employee under regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552 (1) of this title but may not be retained to the credit of the employee under section 5552 (2) of this title.

(2) This subsection does not apply to any reclassification action nor authorize the setting aside of an otherwise proper promotion by a selecting official from a group of properly ranked and certified candidates.

(3) For the purpose of this subsection, "grievance" and "collective bargaining agreement" have the meanings set forth in section 7103 of this title. "unfair labor practice" means an unfair labor practice described in section 7116 of this title, and "personnel action" includes the omission or failure to take an action or confer a benefit.

(c) The Office of Personnel Management shall prescribe regulations to carry out this section. However, the regulations are not applicable to the Tennessee Valley Authority and its employees. (Added Pub. L. 90-83, § 1(34)(C), Sept. 11, 1967, 81 Stat. 203, amended Pub. L. 94-172, § 1(a), Dec. 23, 1975, 89 Stat. 1025; Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1216; Pub. L. 96-54, Aug. 14, 1979, 93 Stat. 382.)

## ROUTING AND RECORD SHEET

SUBJECT: (Optional)

Request for Approval of a Retroactive Promotion - FROM Policy and Programs Staff/OP  
1006 Ames

EXTENSION

NO.

DATE

30 April 1982

TO: (Officer designation, room number, and building)

DATE

RECEIVED

FORWARDED

OFFICER'S  
INITIALS

COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

1. C/P&PS  
1006 Ames

30 APR 1982

*Seen in draft*

2.

3. DD/PAGE  
1006 Ames

4.

5. EA/OP  
5E58 Hqs

6.

7. DD/OP  
5E58 Hqs

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9.

D/OP

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15.

Both SPD and we have reviewed this case and determined that a retroactive promotion may be approved under a broad interpretation of the Back Pay Act provision for correcting "unjustified or unwarranted personnel actions" which result in the "withdrawal, reduction, or denial of all or part of the pay... otherwise due the employee." While it could be argued that our promotion system is really discretionary (it does not guarantee promotions) and that no one has a vested right to promotion, we believe that the PAR which is now being withdrawn did serve to delay the advancement that  total performance record seems to support. Your approval is therefore recommended for retroactive promotion to 24 January 1982.

## Distribution:

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